

*United States Court of Appeals  
for the Second Circuit*



**AMICUS BRIEF**



**76-6097** ORIGINAL

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

F. W. EVERSLY & CO., INC., & F. W.  
EVERSLY & CO., INC., on behalf of  
itself and all other persons entitled  
to share in funds allocated for the  
improvement of real property owned by  
The East New York Non-Profit H.D.F.C.,  
INC.

Docket Nos. 76-6097,  
76-6099

B

Plaintiff-Appellee,

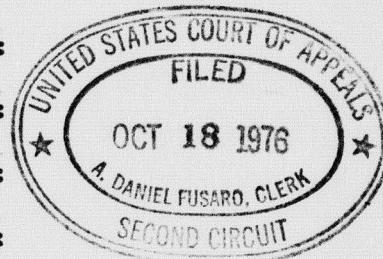
- against -

CARLA A. HILLS, Secretary to the United  
States Department of Housing and Urban  
Development, THE EAST NEW YORK NON-PROFIT  
H.D.F.C., INC., and THE EAST NEW YORK  
SAVINGS BANK,

Defendants,

CARLA A. HILLS, Secretary of the United  
States Department of Housing and Urban  
Development,

Defendant-Appellant



P/S

AMICUS CURIAE BRIEF  
IN SUPPORT OF PLAINTIFF-  
APPELLEE, F. W. EVERSLY  
& CO., INC.

KAUFMAN, TAYLOR, KIMMEL & MILLER  
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NEW YORK, N.Y. 10017  
Attorneys for Subcontractors  
Trade Association, Inc.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
F. W. EVERSLY & CO., INC., & F. W.  
EVERSLEY & CO., INC., on behalf of :  
itself and all other persons entitled :  
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improvement of real property owned by :  
The East New York Non-Profit H.D.F.C., :  
INC. :  
Plaintiff-Appellee, : Docket Nos. 76-6097,  
- against - : 76-6099  
CARLA A. HILLS, Secretary to the United :  
States Department of Housing and Urban :  
Development, THE EAST NEW YORK NON-PROFIT :  
H.D.F.C., INC., and THE EAST NEW YORK :  
SAVINGS BANK, : AMICUS CURIAE BRIEF  
Defendants, : IN SUPPORT OF PLAINTIFF-  
CARLA A. HILLS, Secretary of the United :  
States Department of Housing and Urban :  
Development, : APPELLEE, F. W. EVERSLY  
Defendant-Appellant : & CO., INC.  
-----x

PRELIMINARY STATEMENT

This brief is submitted amicus curiae by the Sub-contractors Trade Association, Inc. in support of F. W. Eversley & Co., Inc., plaintiff-appellee.

The Association consists of approximately 400 of the major subcontractors and suppliers in the metropolitan New York City area. Many of its members were the sub-

contractors and suppliers who participated in the construction of the subject housing premises. They as well as others subcontractors and suppliers provided the bulk of the work and materials which made the housing possible for the tenants who now occupy the two projects. These subcontractors and suppliers have not been fully paid and they would be the beneficiaries of the affirmants of the judgments which have been granted and entered below in favor of the plaintiff-appellee. If such monies are not eventually recovered by them, then the financial disaster which has overtaken the construction industry generally in the metropolitan area will have been seriously aggravated.

#### SUMMARY OF ARGUMENT

The Association adopts the argument of the plaintiff-appellee herein. To the extent that the monies recoverable under the judgment below are payable to EVERSLY, the fund thereby produced will inure to and constitute a trust fund for the subcontractors and suppliers of EVERSLY, pursuant to Article 3-A of the Lien Law of the State of New York.

#### POINT I

THE REVERSAL OF THE JUDGMENTS BELOW  
WOULD WORK AN UNJUST ENRICHMENT OF  
THE GOVERNMENT AND THE HOUSING COMPANIES AT THE EXPENSE OF EVERSLY  
AND ITS SUBCONTRACTORS

As observed by Judge Werker below, the 1968 amend-

ments to the National Housing Act sought to promote the production of housing for low and moderate income families. Section 236 of the National Housing Act provided for assistance to the mortgagee on behalf of the mortgagor with resulting reduction of interest costs on the mortgage and, in addition, the construction lender was given protection against all risks of default. The entire program inextricably involved the United States Department of Housing and Urban Development in the provision of the financing of the various projects and the ultimate execution of the construction plans. Ultimately, approval by HUD of final completion was a condition for the final payment to be made to the general contractor. Judge Werker confirmed the view that the housing companies were the "creatures of HUD". These housing companies had no funds of their own and consequently EVERSLY and its subcontractors had been led to believe that they could look to payment for the work done by them to HUD. Judge Werker concluded that the housing companies were simply instruments "for the convenience of the government in effectuating the Section 236 program."

In view of the foregoing circumstances, HUD and/or the banking institutions were, in effect, permitted to acquire the completed projects at substantially less than

their actual value and thereby become unjustly enriched at the expense of EVERSLY and its subcontractors.

Inasmuch as the differentials which would have made EVERSLY and its subcontractors whole exist in the form of escrow funds and retainages withheld by the respective banks, equity commands that an equitable lien be placed upon those funds and retainers.

American Fidelity Fire Insurance Company v. Construcciones

Werl, Inc., 407 F. supp. 164 (D.V.I. 1975).

#### POINT II

EVERSLY AND ITS SUBCONTRACTORS  
ARE BENEFICIARIES OF THE TRUST  
FUND PROVISIONS OF THE LIEN LAW  
OF THE STATE OF NEW YORK

The EVERSLY brief explores at length the salutary purposes of the trust provisions of the Lien Law of the State of New York (Lien Law, Sections 70 et seq.) and the applicability of such provisions to the case at bar. It would be a needless affectation of research for this amicus curiae brief to reiterate the authorities in support of that position. As amicus, therefore, the Association endorses and concurs in the views expressed in the EVERSLY brief.

POINT III

EVERSLEY AND ITS SUBCONTRACTORS  
ARE THIRD PARTY BENEFICIARIES  
OF THE BUILDING LOAN AGREEMENTS

As in Point II above, the reiteration of the authorities cited in the EVERSLY brief would add nothing to the excellent exposition of the authorities therein. It is suffice to respectfully direct the attention of this Court to the well-established principles of law that recovery may be had on a contract by those persons who are intended beneficiaries of such contract.

German Alliance Insurance Co. v. Home Water Supple Co.  
226 US 220, 230; Pearlman v. Reliance Insurance Co., 371  
US 132, 138.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

KAUFMAN, TAYLOR, KIMMEL & MILLER  
Attorneys for Subcontractors  
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amicus curiae  
41 East 42nd Street  
New York, New York 10017

Of Counsel,  
Irwin M. Taylor

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )  
                       ) SS.:  
COUNTY OF NEW YORK)

FRANCES MONTANA, being duly sworn, deposes and says:  
Deponent is not a party to the within action, is over 18 years  
of age and resides in the State of New York.

On October 12, 1976, deponent served the within AMICUS  
CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE, F. W. EVERSLY &  
CO., INC. upon the following:

ROBERT B. FISKE, JR.  
United States Attorney for the  
Southern District of New York,  
Attorney for Defendant-Appellant Hills,  
at United States District Courthouse,  
Foley Square,  
New York, New York 10007

DEMOV, MORRIS, LEVIN & SHEIN  
Attorneys for F. W. Eversley, Plaintiff-Appellee,  
at 40 West 57th Street,  
New York, New York 10019,

the address designated by said attorneys for that purpose by  
depositing a true copy of same enclosed in a post-paid properly  
addressed wrapper, in an official depository under the exclusive  
care and custody of the United States Postal Service within the  
State of New York.

Frances Montana  
FRANCES MONTANA

SWORN to before me this  
12th day of October, 1976.

Irwin M. Taylor  
Notary Public

IRWIN M. TAYLOR  
Notary Public State of New York  
No. 31-9294090  
Qualified in New York County  
Commission Expires March 30, 1978